

MINUTES OF SPECIAL MEETING
MAPLE-STEELE JOINT WATER RESOURCE DISTRICT
CASS COUNTY HIGHWAY DEPARTMENT
WEST FARGO, NORTH DAKOTA
FEBRUARY 14, 2014

The Maple-Steele Joint Water Resource District met on Monday, February 14, 2014, at 9:00 a.m. at the Cass County Highway Department, West Fargo, North Dakota.

Present were Jurgen Suhr, Chairman; Rodger Olson, Maple River Water Resource District; Josh Ihry and Greg Thykeson, Steele County Water Resource District; Tor Bergstrom, Steele County Water Resource District (by telephone); Carol Harbeke Lewis, Secretary-Treasurer; Brittany C. Moen, Administrative Assistant; Sean Fredricks, Attorney for the Board; Mike Opat, Engineer for the Board; Ken Evenson, Brett Fehr and Shawn Olason, Barnes County Water Resource District. Gerald Melvin, Maple River Water Resource District; Jerry Hieb and Bruce Anderson, Barnes County Water Resource District, were absent.

Reorganization of the Board for calendar year 2014

It was moved by Manager Ihry and seconded by Manager Olson to appoint the following officers for the year 2014:

Jurgen Suhr	Chairman
Greg Thykeson	Vice Chairman
Carol Harbeke Lewis	Secretary-Treasurer

Upon roll call vote, the motion carried unanimously.

Upper Maple River Dam

It was moved by Manager Ihry and seconded by Manager Olson to approve and authorize the Chairman to sign the *Consent to Representation Letter* for Sean Fredricks, Ohnstad Twichell, P.C. to represent the Maple-Steele Joint Water Resource District and the Barnes County Water Resource District regarding the project, including the development of the assessment district to finance and fund the Upper Maple River Dam. Upon roll call vote, the motion carried unanimously.

Mr. Fredricks distributed and reviewed a *Joint Powers Agreement* regarding the Upper Maple River Dam Assessment District with the Maple-Steele Joint Water Resource District and the Barnes County Water Resource District.

It was moved by Manager Thykeson and seconded by Manager Ihry to approve and authorize the Chairman to sign the *Joint Powers Agreement* between the Maple-Steele Water Resource District and the Barnes County Water Resource District regarding the Upper Maple River Dam Assessment District. Upon roll call vote, the motion carried unanimously.

Before the Board proceeded with discussion of project specifics, Sean Fredricks conducted a conflict analysis to determine if any of the Maple-Steele water managers or any of the Barnes County water managers would have a “conflict” under North Dakota law. More specifically, Mr. Fredricks asked if any of the water managers own any property that would benefit from the Upper Maple River Dam or any property that would in any way be impacted by the project. Chairman Suhr owns property within the benefitted area and, with that in mind, Mr. Fredricks conducted a conflict analysis to address Chairman Suhr’s property that would benefit from the project.

Conflict analysis requires a specific analysis under N.D. Cent. Code § 44-04-22. Section 44-04-22 provides the relevant standard for determining whether or not a conflict exists, and how a public entity should address a conflict once identified. Section 44-04-22 provides:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

Mr. Fredricks explained that, to justify an abstention regarding a matter before a governing entity, a public official must have a “direct and substantial personal or pecuniary interest” in the matter. The mere appearance of a conflict is not enough to allow a public official to refrain from participating. The North Dakota Supreme Court adopted a “rule of necessity” that requires public officials to participate in matters before their respective boards. The public policy rationale is that public officials have a duty to vote on issues before them, and cannot avoid participation simply to avoid the appearance of impropriety.

The Section 44-04-22 test requires a multi-step analysis. First, a public official concerned about a conflict of interest should confer with the Board’s attorney to determine if a “direct and substantial personal or pecuniary interest” conflict exists under Section 44-04-22. If the public official’s review with the governing entity’s attorney is not dispositive, the remainder of the governing entity’s Board should vote to determine if a conflict exists by a majority vote. If the remaining members conclude a conflict does exist (or if the member and the Board’s attorney conclude a conflict exists), the remainder of the Board should next vote on whether or not the public official should

“participate in or vote on that particular matter” So even if a conflict does exist (even if the official does have a “direct and substantial personal or pecuniary interest” in the matter), if the governing entity concludes the public official should still participate despite the conflict, the official must participate.

In this situation, Mr. Fredricks explained the North Dakota Supreme Court in Klindt v. Pembina County Water Resource Board, 697 N.W.2d 339 (N.D. 2005), concluded that participation in an assessment district process by water managers with ownership interests in benefitted property rose to the level of a conflict under Section 44-04-22. However, the water resource district in the Klindt case evidently did not conduct the proper conflict analysis under Section 44-04-22. Mr. Fredricks advised that, in his opinion, Chairman Suhr’s ownership of property within the proposed assessment district qualifies as a “conflict” under Section 44-04-22. However, Mr. Fredricks further advised the Maple-Steele Joint Water Resource District it should conduct the next phase of its analysis under Section 44-04-22; even if a conflict does exist, if the remaining members of the Maple-Steele Joint Water Resource District conclude Chairman Suhr should still participate in matters regarding the Upper Maple River Dam despite the conflict, Chairman Suhr must participate. The Board discussed Chairman Suhr’s familiarity with the area and the value he brings to the project and to the assessment district process. In addition, the managers did not believe the benefit to Chairman Suhr’s property would impact his decision-making regarding the project. With that in mind, it was moved by Manager Ihry and seconded by Manager Olson to require Chairman Suhr’s participation in all matters and votes regarding the Upper Maple River Dam, despite his technical conflict under Section 44-04-22. Upon roll call vote, the following managers voted in favor of the motion: Ihry, Olson, Thykeson, Bergstrom. Chairman Suhr abstained from the vote, upon advisement from Mr. Fredricks. The motion carried unanimously. In light of the vote of the remaining members, Mr. Fredricks advised Chairman Suhr he can and should participate in all votes regarding the Upper Maple River Dam.

Mike Opat informed the Board the Section 404 Permit for the project has been received from the Corps of Engineers. He went on to review the conditions on the permit with the Board. It was moved by Manager Ihry and seconded by Manager Olson to authorize the Chairman to sign the Section 404 permit for the Upper Maple River Dam, and submit it to the Corps of Engineers. Upon roll call vote, the motion carried unanimously.

Mr. Opat said the Wetland Mitigation Plan is in development, and will need to be submitted to the Corps of Engineers within 120 days.

The *Engineer’s Report* and funding for the Upper Maple River Dam was reviewed. Manager Olson discussed potential cost-share set aside by the Diversion Authority for retention, the Cass County Flood Sales Tax and potential federal cost-share that is not included in the current *Engineer’s Report*. Project assessments were also reviewed.

The assessment voting process for the project and project timeline were reviewed. Ballots for the project will be going out in the next couple of weeks. The project hearing for the Upper Maple River Dam will be at 10:00 a.m. on April 2, 2014, in Page, North Dakota.

It was moved by Manager Thykeson and seconded by Manager Olson to approve the following resolutions regarding the Upper Maple River Dam:

- *Resolution of Necessity;*
- *Resolution Determining Benefitted Property and Setting Project Hearing; and*
- *Resolution Approving Engineer's Report.*

Upon roll call vote, the motion carried unanimously. The Resolutions are attached to these minutes.

Minutes

It was moved by Manager Olson, seconded by Manager Ihry and unanimously carried to approve the minutes of the December 9, 2013, and January 14, 2014, meetings, as presented.

Adjournment

There being no further business to be considered by the Board, the meeting adjourned without objection.

APPROVED:

Jurgen Suhr
Chairman

ATTEST:

Carol Harbeke Lewis
Secretary-Treasurer